No. 89-1599

In The

Supreme Court of the United States

October Term, 1989

LANGAN ENGINEERING ASSOCIATES, INC.,

Petitioner,

vs.

21ST PHOENIX CORPORATION, formerly known as THE HANSON DEVELOPMENT COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether a federal court with undisputed subject matter jurisdiction to decide a Rule 14(a) third-party claim for "pass through" construction project delay damages between non-diverse third-parties is also empowered to decide a claim for additional delay damages between those same parties where the non-diverse third-party defendant has been properly impleaded and the claim for such additional delay damages arises out of and is logically entwined with the same construction delays as the main removal action between diverse parties.

PARTIES

All parties to the proceeding in the court whose judgment is sought to be reviewed include:

King Fisher Marine Service, Inc., a Texas corporation [Plaintiff and hereinafter "King Fisher"];

21st Phoenix Corporation, formerly known as The Hanson Development Company, a Delaware Corporation with its principal place of business in New Jersey [Defendant, Third-Party Plaintiff and Appellee, and hereinafter "Hanson"];

Langan Engineering Associates Inc., a corporation with its principal place of business in New Jersey [Third-Party Defendant and Appellant, and hereinafter "Langan"]; and

Highlands Insurance Company, a Texas corporation [Third-Party Defendant and hereinafter "Highlands"].

To the best of our knowledge, none of these parties has any parent or subsidiary company to be listed herein.

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STATEMENT OF THE CASE

The material facts of this construction litigation are correctly recited in the district court's opinion below, *King Fisher Marine Serv., Inc. v. Hanson Dev. Co.*, 717 F.Supp. 727, 728 (D.Kan. 1987), which appear at pages 45-48 of the Appendix to the Petition for Writ of Certiorari, and will not be restated here. Nevertheless, some additional facts require separate articulation to ensure clarity and to rectify certain perceived misstatements set forth in the Petition for a Writ of Certiorari ["Petition for Writ"].

On December 19, 1973, after this construction litigation had been properly removed to federal court, Judge Templar granted Hanson leave to file a third-party complaint against Langan which contained claims for "pass through" liability under Rule 14(a) *and* construction delay damages in excess of the "pass through" claim. [*Cf* R.Vol. I, Doc. 18, Order, 12/19/73, *with* R.Vol. I, Doc. 14, Defendant's Motion for Leave, 12/10/73, and Exhibit A thereto at Third-Party Complaint, Count I]. Because King Fisher and Hanson had interposed substantial claims against each other in the main diversity action for damages arising out of the same construction delays, Judge Templar expressly recognized a "likelihood that issues developed will demonstrate that Langan may be liable to Hanson, depending upon the outcome of the main claim . . . " [R.Vol. I, Doc. 18, Order, 12/19/73, p. 2].

On December 27, 1973, Hanson impleaded Langan as a third-party defendant and interposed both of its claims against Langan which had been previously approved for filling by the district court. [R.Vol. I, Doc. 19, Amended Answer, Amended Counterclaim and Third-Party Complaint, 12/27/73, Third-Party Complaint at Count I]. Langan subsequently filed its Answer to Third-Party Complaint and Counterclaim. [R.Vol. I, Doc 26, Answer to Third-Party Complaint and Counterclaim, 3/1/74]. While Langan generally denied liability to Hanson, it did not challenge the propriety of its joinder or Hanson's third-party claims, and it did not request remand of these proceedings, in whole or in part, to state court. [*Id.* at 1-3]. However, in further response to Hanson's third-party claim for construction delay damages in the amount of $136,395.60, Langan asserted its own counterclaim for

"pass through" liability against King Fisher. [R.Vol. I, Doc. 26, Answer to Third-Party Complaint and Counterclaim, 3/1/74, p. 3]. This counterclaim alleged, among other things, that King Fisher was solely responsible for all construction delays and that "[i]f the defendant . . . recovers against the Third-Party Defendant . . . for any delays in the completion of Marina Lakes project then the Third-Party Defendant claims against the plaintiff [King Fisher] for any and all such damages." [*Id.*, p. 3 at ¶¶ 3-4].

During the period from 1974 through 1977, the parties conducted extensive pretrial discovery, and the district court devoted substantial attention to discovery disputes and motions for partial summary judgment. [*See, e.g.*, R.Vol. I, Docs. 30-98].

On June 29, 1977, prior to the completion of pretrial discovery, the district court held its final pretrial conference in this case [R.Vol. I, Doc. 72, Pretrial Order, 8/1/77, p. 1]. In relevant part, the district court gave Hanson leave to amend its pleadings and answers to interrogatories "in regard to the amount and nature of its damages" [*id.*, p. 5 at ¶ 3], and directed the parties to exchange detailed information regarding their respective claims. [*Id.*, pp. 5-6 at ¶¶ 4-8]. The district court also recognized that one of the "Legal and Factual Issues" for ultimate decision included whether Hanson was "entitled to damages against third-party defendant, Langan Engineering, in the event judgment is rendered against defendant . . . " [R.Vol. I, Doc. 72, Pretrial Order, 8/1/77, p. 7 at ¶ 8].

Following the pretrial conference, on July 7, 1977, King Fisher filed its required list of witnesses, exhibits

and supplemental factual contentions. [R.Vol. I, Doc. 64, Plaintiff's Information, 7/7/77]. King Fisher's supplemental factual contentions identified nine (9) reasons that Hanson or its representatives [e.g., Langan] had caused construction delays and additional expenses. [*Id.*, p. 4]. When Hanson subsequently filed its supplemental factual contentions required by the Pretrial Order, eight (8) of the nine (9) reasons for delays and additional expenses identified by King Fisher also formed the basis of Hanson's third-party claims against Langan. [*Cf* R.Vol. I, Doc. 73, Defendant's Information, 8/4/77, *with* Doc. 64, Plaintiff's Information, 7/7/77]. Likewise, both King Fisher and Hanson designated virtually the same witnesses and exhibits to support their respective positions concerning responsibility for the construction delays which permeated the main diversity action and Hanson's third-party claims against Langan. [*Cf* R.Vol. I, Doc. 64, Plaintiff's Information, 7/7/77, *with* Doc. 69, Defendant's Designation of Exhibits and Witnesses, 7/29/77].

Hanson subsequently amended its pleadings and answers to interrogatories, increasing the amount of Hanson's asserted "delay" damages against both King Fisher and Langan from $136,395.60 to $155,703.60. [R.Vol. I, Doc. 66, Second Amended Answer, Amended Counterclaim and Third-Party Complaint, 7/25/77; Doc. 67, Amended Answers of Defendant to Interrogatories, 7/25/77; *see also* Petition for Writ, p. 6].

On January 24, 1978, Langan's local counsel was permitted to withdraw from this case. [R.Vol. I, Order, 1/24/78]. "At that time, Langan was notified that it should 'take pains' to retain other local counsel in accordance with Local Rule 4(f) of the Rules of Practice for [the

district] court. *This was never done.*" [R.Vol. I, Doc. 124, Memorandum and Order, 12/16/83, p. 3 (emphasis in original)].

On January 16, 1979, nearly eight months after a May 1978 trial setting had been continued, notice was sent to counsel setting this case for trial on April 9, 1979. [*Id.*].

Jay Scott MacNeill, Langan's remaining counsel, was permitted to withdraw from the case on February 14, 1979. [R.Vol. I, Doc. 102, Order, 2/14/79]. However, because of frustrations in setting this case for trial, the district court advised that "the case 'will proceed [to trial] April 9 whether Langan is represented or not.' " [R.Vol. I, Doc. 124, Memorandum and Order, 12/16/83, pp. 3-4].

This case proceeded to trial on April 9, 1979, but Langan did not appear. [R.Vol. I, Doc. 130, Transcript of Proceedings, 4/9/79, p. 2]. The district court was informed that King Fisher and Hanson had "entered into an agreement" to settle the main diversity action under which Hanson would consent to a judgment in favor of King Fisher for $60,000 plus interest, Hanson would dismiss its counterclaim against King Fisher, and Hanson would dismiss its third-party claim against Highlands. [*Id.*, pp. 3-4]. Hanson then proceeded to trial on its third-party complaint against Langan, offered evidence, and requested judgment in an amount less than that established by the undisputed evidentiary record. [*Id.*, pp. 5-10; Petition for Writ, p. 9]. At the conclusion of the trial, the district court advised that it would approve the settlement between King Fisher and Hanson, and that the "exact amount" of Hanson's judgment against Langan

would be taken under advisement. [R.Vol. I, Doc. 130, Transcript of Proceedings, 4/9/79, p. 10].

On April 11, 1979, the district court entered judgment on the "full, final and complete settlement of the matters in controversy" between King Fisher, Hanson and Highlands by reducing "the complaint of King Fisher" against Hanson to judgment in the amount of $60,000, dismissing Hanson's counterclaim against King Fisher, and dismissing Hanson's third-party claim against Highlands. [R.Vol. I, Doc. 104, Journal Entry of Judgment, 4/11/79, pp. 1-2; Doc. 105, Judgment, 4/11/79]. The district court also entered judgment in favor of Hanson "on its third-party complaint" against Langan in the amount of $155,703.50. [R.Vol. I, Doc. 104, Journal Entry of Judgment, 4/11/79, pp. 2-3; Doc. 105, Judgment, 4/11/79]. Langan did not appeal. [Appendix to Petition for Writ, App. 47].

On October 3, 1983, Langan filed a motion to set aside the judgment for the asserted reasons that Langan had no notice of the trial date or the entry of judgment [R.Vol. I, Doc. 109, Motion of Third-party Defendant, 10/3/83; Appendix to Petition for Writ, App. 47]. The district court subsequently denied relief and found, in part, that "[t]he facts of this case do not support a motion for relief from judgment under subparts 4 or 6 of Rule 60(b)." [R.Vol. I, Doc. 124, Memorandum and Order, 12/16/83, p. 3]. Langan thereafter appealed to the Tenth Circuit [R.Vol. I, Doc. 126, Notice of Appeal, 1/5/84].

On September 11, 1985, the Tenth Circuit affirmed the district court's first decision refusing to set aside its judgment against Langan [R.Vol. I, Doc. 142, *King Fisher Marine Service, Inc. v. 21st Phoenix Corp., et al.*, No. 84-1025

(10th Cir., unpublished, 9/11/85) (Order and Judgment)].[1] In particular, the Tenth Circuit rejected Langan's contentions that the imposition of judgment violated due process; "that Fed.R.Civ.P. 60(b) further requires vacating judgment; and that the judgment entered exceeds the damages that the third-party plaintiff originally prayed for." [*Id.*, p. 2; Appendix, p. 2]. Langan, however, did not petition this Court for a writ of certiorari.

On November 13, 1985, Langan filed its second motion in the district court seeking to set aside the judgment rendered on April 11, 1979 in favor of Hanson. [R.Vol. I, Doc. 139, Motion of Third-Party Defendant, 11/13/85]. In this Rule 60(b)(4) motion, Langan contended that the judgment is void for lack of subject matter jurisdiction under *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978), because there was no diversity of citizenship between Hanson and Langan. [*Id.*]. Hanson responded that the district court had ancillary jurisdiction in this removal action over the third-party claim against Langan for "excess" delay damages; that settlement of the claims in the main diversity action did not affect subject matter jurisdiction; and that the district court's potentially erroneous exercise of jurisdiction did not void its judgment nor warrant relief under Rule 60(b)(4). [R.Vol. I, Doc. 148, Memorandum of 21st Phoenix Corporation, 1/27/86].

On September 8, 1987, the district court concluded that "this case is distinguishable from *Kroger* and that this

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[1] This unpublished Order and Judgment of the Tenth Circuit appears in the Appendix hereto, beginning at page 1.

court had the constitutional and statutory authority to exercise jurisdiction . . . " and, accordingly, denied Langan's *second* motion for relief from judgment. [Appendix to Petition for Writ at App. 52]. Langan subsequently appealed and, on January 10, 1990, a unanimous panel of the Tenth Circuit affirmed. The Tenth Circuit held that "the district court's ancillary jurisdiction encompassed all of Hanson's third-party claims. Having exercised its ancillary jurisdiction over Hanson's proper rule 14(a) indemnity claim against Langan, it was within the court's power and its discretion also to hear and decide Hanson's delay damages claim against Langan, given that the claim arose from the same transaction or occurrence as the principal claim by King Fisher against Langan." [Appendix to Petition for Writ at App. 41].

Langan petitions this Court for certiorari review of the Tenth Circuit's judgment affirming the district court's second refusal to grant relief from judgment under Rule 60(b).

SUMMARY OF THE ARGUMENT

No "special and important" reasons exist for discretionary review of the Tenth Circuit's decision below. Rule 10.1, Rules of the Supreme Court (effective Jan. 1, 1990). Respondent accordingly prays that Langan's petition for writ of certiorari be denied in its entirety.

The Tenth Circuit's decision does not materially conflict with the decision of any other United States court of appeals concerning the scope or exercise of ancillary jurisdiction in third-party practice. When, as here, a third-

party claim between non-diverse parties arises out of a tight nucleus of operative fact in common with the main diversity action, the Tenth Circuit recognized that the proper test for ancillary jurisdiction over that claim is whether it also arises out of and is logically related to the same "transaction or occurrence" as one or more claims for which there is an independent basis for federal subject matter jurisdiction. No decision of any United States court of appeals is in conflict with this formulation of the appropriate jurisdictional test. Although there may be "some disagreement" among the circuits concerning the scope of such ancillary jurisdiction, Hanson submits that application of the Tenth Circuit's well-reasoned approach would not alter or affect the outcome of any "decision of another United States court of appeals on the same matter . . . " Rule 10.1(a), Rules of the Supreme Court. Therefore, the "conflict" perceived by Langan lacks legally controlling significance and does not merit discretionary review on writ of certiorari.

The decision of the Tenth Circuit below is also firmly anchored in pertinent decisions of this Court from *Moore v. New York Cotton Exchange*, 270 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750 (1926), through *Finley v. United States*, ___ U.S. ___, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989). Since the district court's constitutional power to decide Hanson's third-party claim for delay damages is undisputed, the Tenth Circuit dedicates most of its forceful analysis to proper application of *Owen Equipment and Erection Company v. Kroger*, 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978), in light of *Moore*, *Aldinger v. Howard*, 427 U.S. 1, 96

S.Ct. 2413, 49 L.Ed.2d 276 (1975), and *Finley*, [*See* Appendix to Petition for Writ at App. 9-27].[2]

After reviewing this line of precedent, the Tenth Circuit correctly concluded that *Owen Equipment* is factually distinguishable and, in view of this Court's reference to *Moore* in *Owen Equipment*, ancillary jurisdiction over a third-party claim between non-diverse parties exists where the claim is logically related to, rather than logically dependent upon, the main action. [Appendix to Petition for Writ of App. 14-21; *cf Owen Equipment*, 437 U.S. at 376, *with Moore*, 270 U.S. at 609-10]. Utilizing the two-step analysis mandated in *Finley*, *Owen Equipment* and *Aldinger*, the court also held that ancillary jurisdiction properly attached to Hanson's third-party claim for delay damages because of the "posture" in which it was asserted and because "Congress has neither impliedly nor expressly negated the exercise of jurisdiction over Hanson's added third-party claim." [Appendix to Petition for Writ of App. 23, 25-27].

In this case, the district court had undisputed constitutional and statutory power to determine the main diversity claims and Hanson's "Rule 14(a) pass-through claims" against Langan. [*See* Petition for Writ, p. 23]. Since it is also undisputed that Langan was properly impleaded as a third-party defendant, unlike *Finley* and *Aldinger*, Hanson's additional claim against Langan did not require the addition of any party over whom there

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[2] Langan's Petition for Writ of Certiorari notably fails to address the impact of *Moore*, *Aldinger* and *Finley* on the proper scope and application of the jurisdictional rules announced by this Court in *Owen Equipment*. Such silence is deafening.

was no independent basis for jurisdiction. [Appendix to Petition for Writ of App. 25-26 and n. 9; *see Finley*, 109 S.Ct. at 2007-08; *Aldinger*, 427 U.S. at 18]. Likewise, this additional third-party claim is "logically related to King Fisher's claim" in that "arguably any [construction] delays by Langan would give rise to damages to both Hanson and King Fisher." [Appendix to Petition for Writ at App. 21]. Because Congress never intended the diversity statute "to confine the jurisdiction of federal courts so inflexibly that they are unable to . . . effectively resolve an entire, logically entwined lawsuit," *Owen Equipment*, 437 U.S. at 377, the existence of ancillary jurisdiction in this case enabled the district court to "effectively resolve an entire, logically entwined lawsuit," *id.*, without requiring Hanson to sacrifice its statutory removal rights or its ability to obtain complete relief. [Appendix to Petition for Writ at App. 19, 27 and 52; *see also Moore*, 270 U.S. at 610]. Therefore, a proper reading of the pertinent decisions from this Court impels that conclusion that "the district court's ancillary jurisdiction encompassed all of Hanson's third-party claims." [Appendix to Petition for Writ at App. 41].

ARGUMENT FOR DENYING THE PETITION

1. The Tenth Circuit opinion below does not materially conflict with the decision of another United States court of appeals concerning the proper scope of ancillary jurisdiction in third-party practice.

Langan contends that the Tenth Circuit's decision in this case conflicts with the decisions in *Hartford Acc. and*

Indem. Co. v. Sullivan, 846 F.2d 377 (7th Cir. 1988), *cert. denied*, 109 S.Ct. 2428 (1989) ["*Hartford*"], *Birmingham Fire Ins. Co. of Pa. v. Winegardner & Hammons, Inc.*, 714 F.2d 548 (5th Cir. 1983) ["*Birmingham Fire*"], and *F.O. Majors v. American National Bank of Huntsville*, 426 F.2d 566 (5th Cir. 1970) ["*Majors*"]. [Petition for Writ, pp. 18-19]. Relying most extensively upon *Hartford*, Langan also argues that "the instant case would have been decided differently if it had arisen in the Seventh Circuit [rather] than the Tenth Circuit." [*Id.*, p. 16]. Hanson vigorously disagrees.

In *Hartford*, certain officers of the Ford City Bank, including Mr. Sullivan, engaged in a conspiracy to defraud the bank in connection with certain real estate loans. Shortly after the bank was informed of the scheme, one of the principal conspirators defaulted, owing the bank more than $2.5 million. 846 F.2d at 379. In an effort to mitigate its damages, "[t]he bank demanded that Sullivan sign over his interest in Neuport Estates, and he complied." *Id.* Ford City Bank subsequently sold Neuport Estates for more than the loan balance it secured, plus expenses, and applied the remaining sale proceeds to other loans of the principal conspirator. *Id.*

Hartford Accident and Indemnity Company insured the bank against "defalcations by its officers" and settled the bank's indemnity claim for $1.25 million, "plus an assignment of Ford City's legal rights." 846 F.2d at 379. But Hartford did not take "an open-ended assignment of Ford City's liabilities." *Id.* at 380. The insurance company was not a citizen of Illinois and subsequently filed suit against the bank officers – all of whom were citizens of Illinois – in federal district court predicated upon diversity of citizenship. 846 F.2d at 379. Sullivan impleaded

Ford City, also a citizen of Illinois, on a third-party complaint under Rule 14(a) "seeking to recover the amount that Ford City had realized from the sale of Neuport Estates over and above the amount owed the bank" on the loan it secured, primarily because "the bank had breached a fiduciary duty to him by applying the proceeds to . . . other loans." *Id.* Characterizing the impleader of Ford City Bank as "somewhere in between . . . examples of proper and improper invocation of ancillary jurisdiction," the Seventh Circuit concluded that Sullivan's third-party complaint should be dismissed for lack of subject-matter jurisdiction. 846 F.2d at 380, 385.

In evaluating the propriety of Sullivan's third-party claims against Ford City Bank, a non-diverse third-party defendant joined on a state law claim which could not serve as the basis for Sullivan's recovery against Hartford, the Seventh Circuit properly concluded that **"the test of same transaction of occurrence. . . .is the proper test to use in determining which Rule 14(a) claims are within the federal courts' ancillary jurisdiction if the doctrine is narrowly construed in the impleader setting, as we think it should be . . . "** 846 F.2d at 382 [emphasis added]. Utilizing the "same transaction or occurrence" test approved by this Court in *Moore*, 270 U.S. at 610, and applied by the Tenth Circuit in its opinion below, the court held that while Hartford's claim against Sullivan and Sullivan's claim against Ford City Bank "involve considerable factual overlap . . . they arise at different times from different events, and thus flunk the test of same transaction or occurrence." 846 F.2d at 382.[3]

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[3] "Hartford's claim against Sullivan arises out of the fraudulent scheme by Orlak and others to defraud the bank,

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The Seventh and Tenth Circuits each agree that the scope of ancillary jurisdiction over third-party claims, while narrow, extends to claims which arise out of the same "transaction or occurrence" as the main action. *Cf Hartford*, 846 F.2d at 382 ["same transaction or occurrence" is the appropriate test], *with* Appendix to Petition for Writ of App. 17-19 [same as *Hartford*, but noting that *Moore* requires only a "logical relationship" between the main and ancillary claims]. Since these circuits apply the same test for ancillary jurisdiction in third-party practice, there is no palpable support for Langan's suggestion that this case "would have been decided differently if it had arisen in the Seventh Circuit . . . " [Petition for Writ, p. 16]. While ancillary jurisdiction in *Hartford* did not encompass Sullivan's third-party claim because it arose at a different time from different factual events than the main diversity claim, 846 F.2d at 382, the same cannot be said about this case. Here, ancillary jurisdiction properly attached to Hanson's third-party claim against Langan for delay damages because it arose at the same time from the same events [i.e., construction project delays] as the main diversity action between King Fisher and Hanson. *See* Appendix to Petition for Writ of App. 19-21. Since it plainly appears that the Tenth Circuit's decision below would not change the holding in *Hartford* and the Seventh Circuit's decision in *Hartford* would not change the outcome in this case, there is no material conflict between

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while Sullivan's claim against the bank arises out of the bank's efforts to cut its losses by foreclosing the Neuport Estates loan after the frauds were discovered." *Hartford*, 846 F.2d at 382.

these circuits which merits discretionary review by this Court.[4]

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[4] The Tenth Circuit acknowledged that two decisions rendered by the United States District Court for the District of Northern Illinois are in "apparent agreement" with Langan's assessment that "logical dependence" is necessary for ancillary jurisdiction over an additional "claim sought to be added." [Appendix to Petition for Writ at App. 16-17]. These decisions, however, are not appellate court opinions; they do not squarely decide that "logical dependence" marks that outer limits of ancillary jurisdiction; and if they do decide that "logical dependence" is an absolute requirement, their continued vitality is highly questionable in view of the Seventh Circuit's opinion in *Hartford*.

In *Nat. Union Fire Ins. Co. v. Continental Illinois Corp.*, 661 F.Supp. 964 (N.D.Ill. 1987), Judge Shadur dismissed the third-party complaint because it was not "based on the same nucleus of the operative fact as the other claims in these actions" without deciding the permissible scope of ancillary jurisdiction in third-party party practice. *Id.* at 970.

In *May's Family Centers, Inc. v. Goodman's Inc.*, 104 F.R.D. 112 (N.D.Ill. 1985), Judge Shadur likewise failed to define the outer limits of ancillary jurisdiction by holding only that such jurisdiction attached where the outcome of the main diversity claim "is a necessary but not a sufficient condition of" the third-party defendant's liability to the third-party plaintiff. *Id.* at 115-16. But since this degree of logical dependence brought the third-party complaint within the court's ancillary jurisdiction, the district court in *May's Family Centers* did not determine the extent to which such dependence may be required, if at all, before a federal court obtains ancillary jurisdiction over a third-party claim between non-diverse parties.

Hanson acknowledges, however, that there is dicta in *National Union* and *May's Family Centers* which suggests "logical

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The Fifth Circuit decisions in *Birmingham Fire* and *Majors* likewise fail to materially conflict with the Tenth Circuit's decision in this case. But before addressing these particular decisions, it should be emphasized that a settled line of precedent in the Fifth Circuit relies upon the same "transaction or occurrence" test for ancillary jurisdiction endorsed by the Seventh and Tenth Circuits. *See Travelers Ins. Co. v. First Nat. Bank, Etc.*, 674 F.2d 633, 638-39 (5th Cir. 1982); *Nishimatsu Construction Co., Ltd. v. Houston Nat. Bank*, 515 F.2d 1200, 1205 (5th Cir. 1975); *Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co.*, 426 F.2d 709, 714-716 (5th Cir. 1970). In *Travelers*, while the court dismissed a cross-claim between non-diverse parties for lack of ancillary jurisdiction, the Fifth Circuit ratified its earlier decision in *Revere Copper*, concluding in the wake of *Owen Equipment:*

> **The key is** the requirement that, for a non-diverse claim to be considered ancillary to a diverse one, it must not only arise from the same 'core of operative facts' as does the diverse claim, but it must also bear a **'logical relationship'** to that claim.

675 F.2d at 638 [emphasis added].

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dependence" as an absolute requirement for ancillary jurisdiction. Nevertheless, the Seventh Circuit's position later articulated in *Hartford* that ancillary jurisdiction exists where a third-party complaint arises out of the same "transaction or occurrence" as the main action demonstrates that such dicta is of no value in resolving the issue presented by Langan for discretionary review.

In *Birmingham Fire*, a hurricane inflicted more than $2 million in damage to the defendants' Holiday Inn. The hotel was insured by two different insurance policies, issued by two separate insurance companies, at the time the hurricane struck. Birmingham Fire Insurance Company of Pennsylvania ["BFI"], a citizen of Pennsylvania, denied coverage and filed a declaratory judgment action against the defendants, citizens of Texas, in the United States District Court for the District of Texas with respect to its liability, if any, on its insurance policy. 714 F.2d at 549. The defendants ultimately filed a cross-complaint against BFI and moved to join the Texas Catastrophe Property Insurance Association ["TexCat"], a creature of Texas statute which also insured the hotel, as an additional defendant on its cross-complaint. *Id.* TexCat moved to dismiss BFI's cross-complaint for lack of jurisdiction premised upon BFI's failure to exhaust administrative remedies required by Texas law. The district court granted the motion. 714 F.2d at 549.

On appeal, the Fifth Circuit affirmed, concluding that BFI's failure to exhaust administrative remedies was fatal to its purported action against TexCat. 714 F.2d at 550. However, BFI also argued that its cross-complaint against TexCat was a "compulstory counterclaim" which automatically and involuntarily vested the district court with ancillary jurisdiction. *Id.* at 551. Because "this case is peculiar," the Fifth Circuit agreed to "go further and elaborate why ancillary jurisdiction is inappropriate and impermissible in this case." *Id.* The court of appeals then held that BFI's cross-complaint against TexCat was not a compulsory counterclaim because it did not arise from the same core of operative facts as the main diversity action and BFI was merely "attempting to

implead additional parties; it is not asserting a counterclaim against an already opposing party." 714 F.2d at 551-552. Given the posture of *Birmingham Fire*, the Fifth Circuit also observed that BFI's attempt to implead a non-diverse party on a state law claim not arising from the same core of operative facts as the main diversity action was expressly prohibited by this Court's decisions in *Aldinger* and *Owen Equipment*. 714 F.2d at 552-53.

By contrast, in this case, Hanson properly impleaded Langan as a non-diverse third-party defendant on its Rule 14(a) "pass through" liability claim that was clearly dependent on the outcome of the main diversity action. Likewise, Hanson's additional claim for "delay" damages in excess of its "pass through" claim arose from the same core of operative facts and was logically related to or entwined with the same transaction or occurrence as the main diversity action. Since the posture of this case is substantially different from the facts of *Birmingham Fire*, it cannot reasonably be said that the Tenth Circuit's opinion below conflicts with this Seventh Circuit decision. *Cf Majors*, 426 F.2d at 567-68 [does not attempt to define the boundaries of permissible ancillary jurisdiction in third-party practice, except to observe that such jurisdiction does not extend to "separate and independent causes or claims"].

Hartford, *Birmingham Fire*, and *Majors* are the only decisions identified by Langan which allegedly conflict with the Tenth Circuit's opinion below. As demonstrated above, however, Langan's contention does not survive scrutiny. Hanson accordingly submits that the Fifth, Seventh and Tenth Circuits are in substantial agreement concerning the proper scope of ancillary jurisdiction, and the

decision of the Tenth Circuit in this case does not materially conflict with the decision of another United States court of appeals on the same matter. *See also United States v. City of Twin Falls, Idaho*, 806 F.2d 862, 867-68 (9th Cir. 1986) [endorses same transaction or occurrence test; must be "a close factual and logical nexus" between third-party claim and main action], *cert. denied*, 482 U.S. 914, 107 S.Ct. 3185 (1987); *Eagerton v. Valuations, Inc.*, 698 F.2d 1115, 1119 (11th Cir. 1983) [must be tight nexus or logical relationship between the ancillary claim and the subject matter properly in federal court]; *Schwab v. Erie Lackawanna Railroad Co.*, 438 F.2d 62, 70-71 (3d Cir. 1971) [endorses same transaction or occurrence test for ancillary jurisdiction over third-party claim in excess of a properly impleaded indemnity claim]; *Noland Company v. Graver Tank & Manufacturing Co.*, 301 F.2d 43, 49-50 (4th Cir. 1962) [proper third-party complaint for indemnity may also include "closely related" claims which arise from the same transaction or occurrence as the main action].

2. The Tenth Circuit opinion below does not conflict with applicable decisions of this Court.

Langan contends that the Tenth Circuit's decision conflicts with the decision of this Court in *Owen Equipment*. [Petition for Writ, pp. 19-22]. However, Petitioner has completely failed to address or dispute the Tenth Circuit's comprehensive analysis and application of *Owen Equipment* in light of this Court's decisions in *Finley, Aldinger* and *Moore*. [*Cf* Petition for Writ, pp. 19-22, *with* Appendix to Petition for Writ of App. 9-27]. In the interest of brevity, Hanson respectfully submits that the Tenth

Circuit's well-reasoned analysis below convincingly demonstrates that its decision does not conflict with *Owen Equipment* or any other applicable decision of this Court. The Tenth Circuit's discussion and analysis of *Owen Equipment*, set forth at pages 9 through 27 of the Appendix to Langan's Petition for Writ, is therefore fully incorporated by reference.

CONCLUSION

For the reasons articulated above, Respondent respectfully requests this Honorable Court to deny Langan's petition in its entirety.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KING FISHER MARINE SERVICE, INC., a Texas corporation,	)	
Plaintiff-Appellee,	)	No. 84-1025 (D.C. No. T-5258) (District of Kansas)
vs.	)	
21st PHOENIX CORP., f/k/a THE HANSON DEVELOPMENT COMPANY, a Delaware corporation,	)	(Filed in the United States Court of Appeals for the Tenth Circuit Sept. 11, 1985)
Defendant, Third-Party Plaintiff-Appellee,	)	
vs.	)	
LANGAN ENGINEERING ASSOCIATES, INC., A CORPORATION,	)	(Filed in the United States District Court for the District of Kansas Nov. 18, 1985)
Third-Party Defendant-Appellant,	)	
vs.	)	
HIGHLANDS INSURANCE COMPANY, a Texas corporation,	)	
Third-Party Defendant.	)	

ORDER AND JUDGMENT

Before MOORE, SETH and McWILLIAMS, Circuit Judges.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R. App. P. 34(a); Tenth Cir. R. 10(e). The cause is thereby submitted without oral argument.

Langan Engineering Associates, Inc., ("Langan") appeals from a judgment of the trial court denying its motion pursuant to Fed. R. Civ. P. 60(b) to set aside a judgment of $155,703.50 on the grounds that it received no notice of trial nor of the judgment itself. On appeal, Langan contends that Fed. R. Civ. P. 55(b)(2) and the due process clause of the Fifth Amendment prohibit the imposition of judgment; that Fed. R. Civ. P. 60(b) further requires vacating judgment; and that the judgment entered exceeds the damages that the third-party plaintiff originally prayed for. Having reviewed the briefs and record, we conclude that the trial court properly analyzed the facts and law; therefore, we adopt its reasoning and affirm its judgment.

The trial court in its Memorandum and Order of December 15, 1983, characterized this case as one of neglect and disregard not qualifying for relief under Fed. R. Civ. P. 55(b)(2) or Fed. R. Civ. P. 60(b). Suit was originally filed in 1972 and languished until 1983 when defendant, third-party plaintiff, 21st Phoenix Corp., formerly known as the Hanson Development Company, sought to execute on its 1979 Kansas judgment by filing it in federal court in New Jersey.

In the meantime, from 1972 to 1983, the record reveals successive problems that Langan experienced with

retained counsel, both in New Jersey where the corporation does business, and in Kansas where suit was filed and local rules require association of out-of-state counsel with a local representative. By 1978, both local and New Jersey counsel were granted permission to withdraw. Since January 1978, Langan was under a court order to retain new counsel. The court made clear that the then five-year-old case would proceed to trial regardless of whether new counsel was secured. Langan failed to appear for trial, and, upon the taking of evidence, judgment was entered against the corporation for $155,703.50. Four years later, Langan moved to vacate the judgment, alleging that neither the corporation nor its attorney received notice of the trial.

The trial court's opinion gave thorough consideration to each of appellant's arguments, holding that neither the facts nor the law support its contentions. We would add that to contort the ensuing five years of inattention and neglect to fit within the parameters of relief provided in Rule 60(b)(4) or (6) would not only reward the appellant for dilatory conduct but distort the purpose of the Federal Rules. The Federal Rules of Civil Procedure were not enacted as a strategic tool useful to a litigant at certain times but disregarded at others.

In adopting the reasoning of the trial court, we would further add that a motion under Rule 60(b) precipitates an extraordinary procedure which permits a court which renders judgment to grant relief from the judgment upon a showing of good cause within the rule. *Brown v. McCormick*, 608 F.2d 410 (10th Cir. 1979). The resulting decision is framed within the sound discretion of the trial court and will be set aside only upon a finding of abuse

of discretion. This standard of review has been underscored in some circuits by stating that denial of relief must be so *unwarranted* as to constitute an abuse of discretion. *Seven Elves v. Eskenazi,* 635 F.2d 396, 402 (5th Cir. 1981) (emphasis in original).

Our review of the briefs and record satisfies us that justice has been done in the light of all the facts. Appellant's self-induced slumbering on his rights cannot be rectified by this court.

The judgment is affirmed.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS,
Clerk